INSTITUTE FOR JUSTICE

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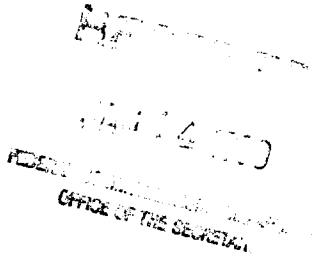

The Hon. William Kennard
The Hon. Susan Ness
The Hon. Michael K. Powell
The Hon. Harold W. Furchtgott-Roth
The Hon. Gloria Tristani
Commissioners
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, DC 20554

Magalie Roman Salas
Office of the Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
TW-A306
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RE: Comment on Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies and Termination of the EEO Streamlining Proceeding. MM Docket Nos. 98-204 and 96-16.

Dear Commissioners:

The Institute for Justice is a nonprofit, public interest law firm whose mission includes advancing the civil rights of citizens by abolishing government's power to classify and discriminate among individuals on the basis of arbitrary and immutable characteristics and by demonstrating that the path to equal opportunity lies not through race and sex preferences but rather in lifting barriers to enterprise, education, and individual autonomy. We submit the following comment on the above-captioned Notice of Proposed Rule Making adopted on November 19, 1998.

I. The Commission's Proposed Recruitment Policy Will Trigger Strict Scrutiny

The Institute strongly disagrees with the legal conclusion that the Commission's proposed recruitment policy does not raise equal protection concerns under the Fifth Amendment's Due Process Clause. *See* NPRM at par. 21. The United States Supreme Court has made it clear that any racial classification used at any level of government triggers strict scrutiny. In *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995),

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the Court set forth the following landmark principle: "We hold today that *all racial classifications*, imposed by whatever federal, state, or local government actor, must be analyzed by a reviewing court under strict scrutiny" (emphasis added).

The Commission's proposed recruitment policy contains at least two racial classifications. It suggests, first, that broadcasters be required to utilize a fixed quota of specified "minority"[1] recruiting sources when an employment vacancy occurs. *See* NPRM at par. 65. The Commission would even adjust the quota based on the size of the minority labor force so that broadcasters in areas with a higher percentage of minorities in the local labor force would be forced to use a higher percentage of minority recruiting sources. Second, the Notice of Proposed Rule Making recommends that broadcasters record the race and ethnic origin of applicants produced by each individual recruiting source and then evaluate their compliance with the Commission's EEO program by examining these records. *See id.* at par. 73. Broadcasters could be sanctioned by the Commission for failure to "broaden their applicant pools to include qualified minorities and women" regardless of the results of their hiring decisions. *See id.* at par. 73-74.

Webster's Seventh New Collegiate Dictionary defines "classification" as "the act or process of classifying," and "classify," in turn, is defined as "to arrange in classes" or "to assign (as a document) to a category." *Id.* at 153. The Commission's proposed recruitment policy clearly includes racial classifications, as recruiting sources and applicants are arranged into classes and assigned to categories by race. Recruiting sources aimed at members of certain racial groups are placed *in a separate category* from other recruiting sources solely on account of racial concerns, and applicants are separated into racial groups when the race and ethnic origins of applicants generated by each individual recruiting source are recorded and examined.

In its Proposed Notice of Rule Making, the Commission does not expressly deny that its proposed recruitment policy contains racial classifications, but instead suggests, contrary to the central holding of *Adarand*, that certain racial classifications do not trigger strict scrutiny. The Commission, using a line of dicta from *Adarand* for support, argues that equal protection concerns arise only "whenever the government *treats any person unequally* because of his or her race." NPRM at par. 21 (*quoting Adarand*, 515 U.S. at 229) (emphasis added in NPRM).

Leaving aside, for now, the inaccuracy of the Commission's claim that its proposed recruitment policy does not encourage unequal treatment on the basis of race, its reading of *Adarand* and other Supreme Court precedent is fundamentally flawed. The crucial holding of *Adarand* is clear and bears repetition: "we hold today that *all racial classifications* . . . must be analyzed by a reviewing court under strict scrutiny." *Id.* at

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[1] The Commission defines "minority" as "Blacks not of Hispanic origin, Asians or Pacific Islanders, American Indians or Alaskan Natives, and Hispanics," *Amendment of Part 73 of the Commission's Rules Concerning Equal Employment Opportunity in the Broadcast Radio and Television Services*, 2 F.C.C.R. 3967 (1987).

227 (emphasis added). The inclusion of the word "all" before "racial classifications" was neither casual nor an inadvertent mistake. Justice O'Connor's opinion repeatedly emphasizes that each and every racial classification used by the government triggers strict scrutiny. *See id.* at 220 ("racial classifications of any sort must be subjected to strict scrutiny" (quoting *Wygant v. Jackson Bd. of Educ.*, 467 U.S. 267, 285 (O'Connor, J., concurring in part and concurring in judgment))); *id.* at 222 ("With *Croson*, the Court finally agreed that the Fourteenth Amendment requires strict scrutiny of all race-based action by state and local governments"); *id.* at 227 ("all governmental action based on race . . . should be subjected to detailed judicial inquiry"); *id.* at 235 ("Federal racial classifications . . . must serve a compelling governmental interest, and must be narrowly tailored to further that interest"). Justice Thomas, in his concurring opinion, reiterated the Court's holding when he wrote, "I agree with the majority's conclusion that strict scrutiny applies to all government classifications based on race." *Id.* at 240.

Attempting to sidestep the Court's holding that all racial classifications trigger strict scrutiny, the Commission cites a single line of dicta from *Adarand* ("whenever the government *treats any person unequally* because of his or her race, that person has suffered an injury that falls squarely within the language and spirit of the Constitution's guarantee of equal protection" *Adarand*, 515 U.S. at 229) and suggests that strict scrutiny is triggered only when any person is treated unequally because of race. The Commission, however, takes this quote out of context. In that line, the Court is defining the elements of an cognizable injury under the Constitution's guarantee of equal protection. It goes without saying that one must be injured before one has standing to bring suit in federal court. But the question of what constitutes a legally cognizable injury is entirely distinct and separate from the question of whether all racial classifications, once injury has been established, trigger strict scrutiny. *See id.*

The Commission's legal argument then seems premised on the notion that the racial classifications here will never be subjected to strict scrutiny because no one will be able to establish a sufficient injury to have standing to bring suit in federal court. It is wrong, however, for the government to knowingly enact an unconstitutional policy, thinking that it can get away with it because no aggrieved party will have standing to mount a legal challenge. But the Commission is also dangerously mistaken in its assumption that no one will have standing to challenge the racial classifications in its proposed recruitment policy. It ignores that portion of the United States Court of Appeals for the District of Columbia's opinion in *Lutheran Church–Missouri Synod v. FCC*, 141 F.3d 344 (D.C. Cir. 1998), in which the court held that a station harmed by an order finding it in violation of EEO regulations has standing to challenge the constitutionality of the regulations it was found to have violated.[2] *See id.* at 349. Simply put, the Commission may not punish broadcasters for failing to properly implement racial classifications unable to pass strict scrutiny. Furthermore, broadcasters are economically

[2] The D.C. Circuit also suggested that stations were injured to the extent that they were forced to discriminate by unconstitutional government regulations. *See Lutheran Church–Missouri Synod v. FCC*, 141 F.3d 344, 350 (D.C. Cir. 1998)

injured by the burden of complying (and documenting compliance) with an EEO program containing racial classifications and thus would have standing to challenge these regulations. *See National Mining Ass'n v. U.S. Dep't of Interior*, 70 F.3d 1345, 1349 (D.C. Cir. 1995) (firms have standing to challenge regulations which "force them to spend money" on compliance); *American Library Ass'n v. Barr,* 794 F. Supp. 412, 416 n.4 (D.D.C. 1992) (compliance with "record keeping" requirements constitutes an "immediate injury"), *aff'd in part*, 33 F.3d 78 (D.C. Cir. 1994).

The Commission's attempt to avoid the strict scrutiny mandated by *Adarand* also fails on its own terms. Under its proposed recruitment policy, the government will force broadcasters to treat persons and entities unequally because of race in at least two ways. To begin with, applicants and potential applicants are treated unequally because of race. Obviously, an employee hired or fired because of racial considerations has been the subject of "race-based decisionmaking." But just as obviously, "race-based decisionmaking" is not limited to the hiring decision and all decisions made by an employer thereafter. A potential employee can be interviewed or not interviewed on account of race. He or she can be allowed to apply or prevented from applying for a job on the basis of race. And he or she can be recruited or not recruited for a position on account of race. Each of the aforementioned decisions holds the potential for "race-based decisionmaking," and when these decisions are made on account of race, people are treated unequally.

Consider the example of two individuals looking for a job in the broadcasting industry: one is recruited and made aware of a vacancy, while the other is not. It goes without saying that the person aware of the job opening has a better chance of being hired for that position, but he or she may earn other less obvious advantages as well. For example, to the extent that an individual is interviewed but does not get the job, he or she has gained useful interviewing experience and may make contacts in the industry which may prove helpful in the future.

The Commission's proposed recruitment policy will ensure that certain qualified individuals are not informed of employment opportunities due to racial classifications. Given the economic reality that all corporations have finite advertising budgets, a requirement that broadcasters use a specified number of minority recruiting sources will inevitably mean that in some instances, a broadcaster will not run an advertisement in a non-minority publication because of the Commission's quota. The tradeoff is inescapable. And once one concedes that an advertisement in a non-minority publication is not run because of the quota, it is not much of a leap to recognize that certain individuals not reached by other recruitment sources would have found out about the job vacancy from the advertisement that was not run. These uninformed individuals therefore have been denied the opportunity to compete for an employment vacancy on an equal footing due to a racial classification and thus suffered a cognizable injury under the Constitution's equal protection guarantee. *See Northeastern Fla. Chapter, Associated Gen. Contractors of America v. Jacksonville*, 508 U.S. 656, 667 (1993) (holding that an

aggrieved party need not demonstrate that he would have received the benefit in the absence of unequal treatment but rather can establish standing by alleging that he was denied equal treatment in the process).

The Commission seeks to replace an unconstitutional system of proportional hiring with an equally flawed system of proportional recruiting. *Cf. Lutheran Church*, 141 F.3d at 356. The bias towards proportionality in the Proposed Notice of Rule Making is manifested in two ways. First, the Commission suggests tailoring the required number of minority recruiting sources to the percentage of minorities in the local labor force. And second, the proposed regime of recordkeeping and self-assessment would pressure broadcasters toward proportional recruiting. By forcing broadcasters to record and evaluate the race and ethnic origin of applicants generated by each individual recruiting source, the Commission is sending a strong signal that it is not enough for broadcasters to publicize job vacancies in a nondiscriminatory manner; minorities must actually apply in sufficient numbers or else the station runs the risk of sanctions. The Proposed Notice of Rule Making does not use the term "productive source" to refer to an advertisement that effectively publicizes a job vacancy, but rather to a recruiting source actually yielding increased numbers of minority applicants. And the Commission seeks to obligate stations to actually "attract a broad cross section of qualified applicants," rather than effectively informing such applicants about job vacancies. The Commission's explanatory language thus reveals the true aim of the policy: ensuring that proportional numbers of minorities are in the applicant pool rather than assuring that job vacancies are advertised in a nondiscriminatory manner.

Beyond treating applicants and potential applicants unequally on the basis of race, the Commission's recruiting regulations will also treat minority recruiting sources differently than non-minority recruiting sources. Just as employment quotas and set-asides treat individuals unequally on account of race, so do recruiting-source quotas and set-asides treat recruiting sources unequally on account of race. For example, in the competition for the advertising dollars generated by employment notices and "help wanted" ads, minority magazines and newspapers would be benefited and their non-minority counterparts would be disadvantaged by the Commission's proposed recruitment policy.

The holdings of the lower court cases cited by the Commission in the Proposed Notice of Rule Making do not support either its argument that certain racial classifications are not subject to strict scrutiny or its position that racially-based recruitment policies do not treat persons unequally because of race. In *Peightal v. Metropolitan Dade County*, 26 F.3d 1545 (11th Cir. 1994), no recruitment or outreach programs were under legal attack, and the court never had occasion to consider whether any of the outreach efforts briefly described in the facts of the case employed racial classifications. And the holding of *Duffy v. Wolle*, 123 F.3d 1026 (8th Cir. 1997), is inapposite for two reasons. First, suspect classifications were not at issue in the case, as the one disputed advertisement used for recruitment purposes was placed in a manner

such that all interested individuals would be informed about the vacancy. And second, to the extent that racial classifications are impermissibly used in recruiting, the Eighth Circuit may well be correct that less-qualified non-minority applicants are not among those suffering a legally cognizable injury. As suggested earlier, however, others are injured by such racial classifications.

Admittedly, some of the language in the lower court cases cited by the Commission in footnote 42 of the NPRM could be read to support the argument that the use of racial classifications in the recruitment process does not trigger strict scrutiny. But care must be taken to distinguish race-neutral attempts to broadly publicize employment vacancies in a nondiscriminatory manner with race-conscious requirements that employers use a specified number of minority recruiting sources or attract a certain number of minority applicants. Nondiscriminatory recruitment efforts will include minority recruiting sources, just as nondiscriminatory hiring practices will produce minority hires. The utilization of minority recruiting sources does not create the presumption that racial classifications are being employed, and support for the use of minority recruiting sources is not the equivalent of endorsing the use of racial classifications.

Racial classifications, however, are created when the government explicitly requires broadcasters not just to engage in nondiscriminatory outreach but to direct a specified amount of resources toward minority outreach and to produce a certain number of minority applicants (just as classifications are created when the government requires a broadcaster to hire a certain percentage of minorities). To the extent lower courts have sometimes conflated race-neutral and race-conscious recruiting techniques, the Institute believes that they have been mistaken and have reached conclusions inconsistent with Supreme Court precedent.

II. The Commission's Proposed Recruitment Policy Will Not Withstand Strict Scrutiny

To pass strict scrutiny, racial classifications "must serve a compelling governmental interest, and be narrowly tailored to further that interest." *Adarand*, 515 U.S. at 235. The only basis that the Supreme Court has recognized as compelling is the remedy of past discrimination, which the Commission here does not assert or demonstrate as its justification. To the extent that the Commission seeks to justify these regulations by the need for diversity in the workplace or diverse programming content, such an argument will not meet with success.

The D.C. Circuit made it abundantly clear in *Lutheran Church* that the Commission's promotion of diversity does not rise to the level of a compelling interest. The court wrote, "[I]t is impossible to conclude that the government's interest, no matter how articulated, is a compelling one." *Lutheran Church*, 141 F.3d at 354. Indeed, the court voiced its doubt "that the Constitution permits the government to take account of

racially based differences, much less encourage them," and illustrated the dangers of validating such differences by noting the specific complaint leading to the *Lutheran Church* case had been triggered by the NAACP's concern that the Church had stereotyped African-Americans as uninterested in classical music. The D.C. Circuit, moreover, is not alone in rejecting the notion that diversity constitutes a compelling governmental interest. *See, e.g.*, *Hopwood v. Texas*, 78 F.3d 932, 948 (5th Cir. 1996) ("the use of race to achieve a diverse student body . . . cannot be a state interest compelling enough to meet the steep standard of strict scrutiny"); *see also Wessmann v. Gittens*, No. 98-1657 (1st Cir. Nov. 19, 1998) (holding that diversity based solely on racial and ethnic criteria does not rise to the level of a compelling interest).

The Institute completely rejects the idea that it is legitimate for the government to associate or link certain viewpoints, tastes, or interests with race. This nation's history should give significant pause to those who believe it wise for the government to distinguish citizens on this basis. Justice Kennedy starkly demonstrated the slippery slope inherent in such race-conscious thinking when he quoted from the former South African government's official justification of apartheid: "the policy is . . . based . . . on the fact that people differ, particularly in their group associations, loyalties, culture, outlook, modes of living, and standards of development." *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 635 (Kennedy, J., dissenting) (quoting *South Africa and the Rule of Law* 37 (1968) (official publication of the South African Government)).

Even were the Commission able to advance a compelling governmental interest in support of its policy, however, the Institute strongly believes that the policy would still fail strict scrutiny as not being narrowly tailored to furthering that interest. To the extent that the compelling interest advanced would be programming diversity, the Commission has failed to identify any new evidence in its Proposed Notice of Rule Making to address the D.C. Circuit's concern that the Commission could marshal no evidence linking low-level employees to programming content. Racial classifications used in the recruitment of low-level employees thus could not possibly be narrowly tailored to advancing the interest of programming diversity.

More broadly, the Institute agrees that conducting expansive outreach efforts to inform potentially qualified candidates of job vacancies is a worthy endeavor. The Commission, though, has utterly failed to demonstrate that this objective must be met through the use of racial classifications. In *City of Richmond v. J.A. Croson, Inc.*, 488 U.S. 469 (1989), the Supreme Court stressed the importance of first looking to the government's consideration of race-neutral measures in examining whether racial classifications are actually narrowly tailored to advancing the identified compelling interest. *Id.* at 507. The Court thought it important that the City of Richmond, in that case, had given no consideration to race-neutral measures before instituting racial classifications.

In this instance, the Commission similarly has not recognized that effective outreach programs need not include racial classifications. Specifically, the Commission could adopt a race-neutral recruitment policy based on the following uncontroversial premises: (1) broadcasters should be required to widely publicize all employment vacancies in a manner designed to inform potential job candidates, and (2) recruitment programs should be implemented in a nondiscriminatory manner. This proposal addresses the Commission's concerns with the potentially discriminatory consequences of relying on word-of-mouth recruiting without resorting to race-based decisionmaking.

To accomplish the Commission's legitimate aims, there is absolutely no need to require the use of a certain number of specified minority recruiting sources or to adjust that number of sources depending upon the prevalence of minorities in the local labor force. There is similarly no reason to require broadcasters to keep track of the racial and ethnic composition of the applicants who respond to each individual recruiting source, a recordkeeping task which would prove quite burdensome. Just as it is possible to enforce nondiscrimination in hiring without resorting to quotas, it is possible to enforce nondiscrimination in outreach and recruitment without resorting to quotas. And just as nondiscrimination in hiring can be enforced without encouraging proportionality, so, too, can nondiscrimination in recruitment be enforced without encouraging proportionality.

There is no reason to believe that a nondiscriminatory outreach program will produce a proportional number of minority job applicants. It is a "completely unrealistic assumption that minorities will choose a particular trade in lockstep proportion to their representation in the local population." *Croson*, 488 U.S. at 507 (internal citation and quotation omitted). Recruitment efforts should no more be judged by the number of minority applicants recruited than hiring policies should be evaluated by the number of minority hires. Rather, the efforts and policies themselves should be analyzed to see if they are being conducted in a nondiscriminatory manner. The detailed recordkeeping mandates found in the proposed recruitment policy will inevitably encourage broadcasters to concentrate their energies on finding a certain number of minority applicants rather than implementing a nondiscriminatory recruitment program.

III. The Commission Has Failed to Produce Adequate Evidence in Support of Key Assumptions

The Institute takes no position with respect to the Commission's statutory authority to establish antidiscrimination rules or the question of whether such rules should be extended to all station employees. It is worth noting, however, that the Commission makes key assumptions in support of its proposed policy that are questionable at best. The Commission continues to insist that even low-level employees affect the content of programming. Yet despite the fact that the D.C. Circuit rejected this assertion in *Lutheran Church* because the Commission had introduced no evidence in support of its contention, the Notice of Proposed Rule Making refers to no new support. *See* NPRM at par. 44. Because of staff interaction, the Commission merely asserts that

all employees can affect programming. In the absence of empirical evidence, however, there is reason for marked skepticism that janitors and receptionists meaningfully influence what is put on the air. Similarly, no evidence is provided for the Commission's questionable assumption that low-skilled employees are often promoted to jobs that affect programming decisions or ever earn enough money to buy stations.

The Commission also offers no evidence or studies as support for its contention that "as more minorities and women are employed in the broadcast industry, it is more likely that varying perspectives will be aired and that programming will be oriented to serve more diverse interests and needs." *Id.* at par. 41. Although the Institute objects to the government's authority to base policy on alleged differences in viewpoint or taste on the basis of race, at the very least, the Commission should be required to offer compelling empirical support for this dubious proposition.[3]

IV. Conclusion

The Commission's proposed recruitment policy contains racial classifications that will trigger strict scrutiny under the Constitution's equal protection guarantee and are not likely to withstand such exacting judicial examination. The Institute urges that these racial classifications be removed from the final policy. The Commission should instead consider requiring broadcasters to widely publicize employment vacancies in a nondiscriminatory manner. Just as quotas are not necessary to prevent discriminatory hiring, neither are they necessary to prevent discriminatory recruiting. The Institute hopes that the Commission will realize that broad outreach does not necessitate race-conscious action and can easily be accomplished through race-neutral means.

Respectfully submitted,

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[3] In a free market, the audience presumably drives programming content more so than station employees. One assumes that programmers do not cater to their own tastes but to the tastes of audiences as reflected by ratings; those that do cater to their own tastes likely do not remain programmers for long.